

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**CRIMINAL APPEAL No. 834 of 1997****For Approval and Signature:****HONOURABLE MR.JUSTICE AKIL KURESHI**

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1 Whether Reporters of Local Papers may be allowed
to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy
of the judgment ?

4 Whether this case involves a substantial question
of law as to the interpretation of the
constitution of India, 1950 or any order made
thereunder ?

5 Whether it is to be circulated to the civil judge
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GANPATBHAI JETHABHAI MEVADA - Appellant(s)**Versus****STATE OF GUJARAT - Opponent(s)**

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Appearance :

MR IMRAN PATHAN FOR MR MM TIRMIZI for Appellant(s) : 1,
MR PD BHATTE, APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI**Date : 26/12/2007****ORAL JUDGMENT**

1.The appeal arises out of judgement and order
dated 4.9.1997 passed by learned Additional
Sessions Judge, Ahmedabad(Rural) in Sessions

Case No.129/1994.

2. The appellant was the original accused. He was charged for having kidnapped a minor girl Urmila on 9.5.1993 and also having committed sexual intercourse against her wish. He was therefore, charged with offences punishable under Sections 363, 366 and 376 of the Indian Penal Code. By the impugned judgement, learned Additional Sessions Judge came to the conclusion that the accused did not forcibly take minor Urmila for nor did he commit any act of sexual intercourse against her wish. Learned Judge therefore, acquitted the appellant of offences punishable under Sections 366 and 376 of the Indian Penal Code. Learned Judge however came to the conclusion that Urmila was aged about 16 years and 9 months on the date of incident. The appellant having taken her away from the legal guardianship of her parents, had committed offence punishable under Section 363 of the Indian Penal Code.
3. It may be noted that during the course of trial, Urmila expired due to health reasons before her evidence could be recorded.
4. Complainant Tejabhai Sodabhai-PW1 was examined at exh.12. He stated that on 9.5.1993 there was a marriage of his elder brother's daughter. At night at about 10 0' clock when he and other

family members were chatting after dinner, they realised that Urmila was missing. After waiting for half an hour, they started looking for her. They searched for her on several places but did not found her. He lodged complaint before the Chief Judicial Magistrate being Inquiry Case No.65/1993 on 14.5.1993 which was produced at exh.13. Ultimately, upon some information, he along with other family members went to Odhav where near the bus stand they could trace Urmila who was found to be unconscious. He therefore, took her to Civil Hospital. He found that Urmila had consumed some poisonous medicine. She was treated in Civil hospital as an indoor patient for six days. They thereafter, took Urmila to the police station and then to their house. He stated that date of birth of Urmila is 21.8.1976. She was therefore, aged about 16 years and 8 months on the date of incident.

4.1 In the cross examination, he agreed that he has four other daughters besides Urmila. He however, could not state the date of birth of any of his daughters. Significantly, in his written complaint to the Magistrate, he has joined Urmila as one of the accused and charged her for having committed theft in his house.

5. Similar version has been given by Jairambhai Laljibhai Parmar-PW2 (relative of the complainant) at exh.14, Kanjibhai Sodabhai-

PW3(elder brother of the complainant) at exh.15 and also by Kankuben Tejabhai-PW5(wife of the complainant) at exh.17.

- 6.To prove the age of girl, prosecution examined Sanabhai Jivabhai-PW7 at exh. 20. He was the Talati-cum-mantri of village Kathvada. He produced birth certificate of Urmila showing her date of birth as 21.8.1976. From his evidence, it comes on record that birth of the daughter of the complainant and his wife was recorded on 30.8.1976. Regarding the name of the daughter who was born on 21.8.1976, column was left blank at that time. He admitted that name of Urmila was entered in the Birth Register only on 8.9.1993. He however, could not state as to on what basis this entry was made or who made the entry.
- 7.Dr. Belaben Amitbhai Patel-PW12, exh.35 had carried out the medical check up of Urmila. She had taken out her X-rays to asses her age. As per her opinion considering the X-ray of girl she was estimated to be between 18 and 20 years of age.
- 8.As noted earlier, learned Additional Sessions Judge in his impugned judgement came to the conclusion that the girl Urmila was not taken away forcibly nor intercourse done by the appellant against the wish of the girl. Short

question therefore, calls for consideration is despite these conclusions which are not challenged by the State, conviction of the appellant under Section 363 of the Indian Penal Code is justified.

9.To decide this question two aspects would become relevant. First question would be the age of the girl and second question would be whether she was taken away by the appellant from the lawful guardianship of her parents.

10.To prove age of the girl, prosecution has heavily relied on her birth certificate and on the deposition of Sanabhai-PW7 who stated that birth of Urmila was registered to have born on 21.8.1976. He however, clearly admitted that name of the girl was not entered when such birth was registered on 30.8.1976 and in fact the same was entered on 8.9.1993 i.e after the incident of the girl missing from her parents' house. He also has not stated as to on what basis such entry was made. Coupled with this, complainant-father of Urmilaben admitted that he has four other daughters besides Urmila. He however, could not state the age of any of the girls before the Court.

11.Considering all these aspects, it would be highly unsafe to rely on the deposition of Talati-cum-mantri stating that date of birth of

Urmila was 1976 as per Government records. Additionally, I also find that Dr. Belaben-PW12 assessed the age of girl between 18 to 20 years. In view of the evidence discussed above, I find that prosecution failed to establish beyond reasonable doubt that Urmila was below 18 years of age on the date of incident.

12. Coupled with the above conclusion, I also find that there was evidence on record to suggest that Urmila had out of her free choice and full consciousness left her parents' house. Complainant had initially joined Urmila as one of the accused and charged her with having stolen property from his house. When ultimately chased, Urmila was found having consumed poison and she was in unconscious stage. Thus it is apparent that girl had a love affair with the appellant. The two left their respective house on account of probable resistance to their affair by the girl's parents. As per the deposition of the complainant, Urmila was studying in 11th Standard. She was thus not an immature girl nor of such tender age as she would not understand the repercussions of her action. Her leaving of her father's house voluntarily to join the appellant therefore, cannot be taken to be an act of kidnapping by the appellant.

13. In an order dated 17.12.2007 passed in Criminal

Appeal No. 547/1997 following observations were made :

"7. The question, however, is despite which, can the appellant be convicted under sections 363 and 366 of the Indian Penal Code. Section 363 makes kidnapping of a minor punishable. On record there is deposition of Manojkumar Bhavsar, PW-6, Ex.18. He was performing duty as in-charge Sheristadar in the Health Department of the Ahmedabad Municipal Corporation. He produced the birth certificate of Bhartiben. The date of birth recorded is 19th July 1978. In his cross-examination, however, he agreed that often information about birth of a child is sent without the name of the child, upon which birth date is registered without name. He stated that if an application is made by the parent or guardian of a child within 15 days, the name is entered in the register. He agreed that name of Bhartiben was added subsequently. He, however, could not state as to when the name was added. He stated that the Corporation has no documents to show as to when the name was added. He also could not state whether the same could have been added in recent past.

Significantly, there is no medical evidence assessing the age of the girl. Though it is stated that the girl had studied upto 7th standard, her school leaving certificate was also not produced.

8. It would thus appear that the age of the girl was not established with a degree of certainty required in a criminal prosecution. It is true that ordinarily, birth certificate would render an authentic piece of evidence to establish the age of a person. In the present case, however, defence had raised a reasonable doubt about the name of the girl being added subsequently and possibility of the same having been added in recent past could not be completely ruled out. Officer of the

Municipality, could not state with any degree of certainty as to when the name was added. He could not produce any documentary evidence to show as to on what basis and at which point of time, the name was added in the birth register. The entire issue could have been different beyond the pale of suspicion if the prosecution had also produced the school leaving certificate. This was, however, not done. Exact age of the girl, therefore, remained unproved.

9. Additionally, I also find that there was no element of taking the girl away from the care of the lawful guardian. Even if she was, therefore, not above 18 years of age, the appellant could not have been convicted under section 363 of the Indian Penal Code. As noted earlier, the girl had herself eloped with the appellant. She was aware about her actions. She was mature enough to understand the repercussions of her steps. Despite which, she left her parents' home and stayed with the appellant on her free will. Both of them stayed as husband and wife. They enjoyed the marital bliss. In fact, she was unwilling to accompany her uncle when the couple was spotted in a garden at Rajkot and that would demonstrate that the appellant was not guilty of offence under section 363 and 366 of the Indian Penal Code."

14. Under the circumstances, I find that learned Judge committed error in convicting the appellant under Section 363 of the Indian Penal Code. His conviction is therefore, set aside.

15. The appeal succeeds and disposed of accordingly. Bail bond stands cancelled.

(Akil Kureshi, J.)

(raghu)